Filed 5/11/20 P. v. Brown CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANDRES MANNER BROWN, Defendant and Appellant.	B299047 (Los Angeles County Super. Ct. No. PA03100)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Terrell, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Amanda V. Lopez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Andres Brown challenges the trial court's summary denial of his petition for resentencing under Penal Code section 1170.95.[1] Appellant argues that section 1170.95 gives rise to "special proceedings" in which the trial court "has only the power to determine whether the statutory requirements are met." From that premise, he contends that the trial court was required to appoint him counsel and afford him the opportunity to file additional briefing because his petition stated a prima facie case for relief. He further argues that the trial court erred by looking beyond the petition to information in the court file, and violated his constitutional rights to counsel and due process. We find no error and affirm.

BACKGROUND[2]

On December 18, 1997, appellant shot Keith Wilcher in the head during an altercation; appellant's gun went off while he was striking Wilcher with it. Wilcher was comatose for eight months and ultimately died. Appellant was arrested in April 1998 and admitted shooting Wilcher. (*People v. Brown* (Mar. 20, 2001, B141167) [nonpub. opn.].)

An information charged appellant with murder (§ 187, subd. (a)(1)) and possession of a firearm by a felon (former § 12021, subd. (a)(1)). It further alleged that appellant personally used a firearm during the commission of the murder (§§ 1203.06,

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

[2]We grant Respondent's unopposed request for judicial notice and take judicial notice of our nonpublished opinion resolving appellant's direct appeal. The facts regarding appellant's crimes and convictions are drawn from that opinion, *People v. Brown* (Mar. 20, 2001, B141167) [nonpub. opn.].

subd. (a)(1); 12022.5, subd. (a)(1)), and that he previously suffered a strike conviction (§§ 667, subds. (b)-(i); 1170.12, subs. (a)-(d)). Appellant pled not guilty and proceeded to jury trial.

The jury found appellant guilty of second degree murder and possession of a firearm by a felon. It also found true the personal use firearm enhancement and prior conviction allegation. The trial court sentenced appellant to 40 years to life. We affirmed appellant's convictions on direct appeal. (*People v. Brown* (Mar. 20, 2001, B141167) [nonpub. opn.].)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), which "amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f).) In addition to other amendments discussed more fully below, SB 1437 added section 1170.95, which establishes a procedure by which individuals convicted of murder under a felony murder theory or the natural and probable consequences doctrine can seek vacation of those convictions and resentencing. (Stats. 2018, ch. 1015, § 4, pp. 6675-6677; see also *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134, review granted March 18, 2020, No. S260598 (*Lewis*).)[3] The provisions of SB 1437 became effective on January 1, 2019.

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[3] The Supreme Court granted review in *Lewis* to consider two issues: "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise

On April 16, 2019, appellant, in propria persona, filed a petition asking the court to vacate his murder conviction and resentence him pursuant to section 1170.95. On the form petition, appellant checked a box affirming the statement, "A complaint, information, or indictment was filed against me that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine." Appellant also checked boxes affirming statements asserting, "At trial, I was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine," "I could not now be convicted of 1st or 2nd degree murder because of changes to Penal Code §§ 188 and 189, effective January 1, 2019," and "I request this court appoint counsel for me during this re-sentencing process."

Appellant attached an additional page to the form petition. It stated, "Petitioner Brown's eligibility is based on changes to Penal Code section §188, specifically that malice shall not be imputed to a principal for participating in a crime. [¶] In the present case, the prosecution, using Cal.Jic 8.32, argued that I was guilty of murder, for engaging in a crime, and that the natural and probable consequences for that crime is murder. [¶] I

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under Penal Code section 1170.95, subdivision (c)." (*Lewis, supra*, S260598) [2020 WL 1291847].) The Supreme Court also granted review in *People v. Cornelius* (2020) 44 Cal.App.5th 54, review granted March 18, 2020, No. S260410 (*Cornelius*) and *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, No. S260493 (*Verdugo*).) The Court deferred briefing in *Cornelius* and *Verdugo* pending its consideration and disposition of *Lewis* or further order. (*Cornelius*, *supra*, S260410; *Verdugo*, *supra*, S260493.)

was convicted to second degree murder, not first-degree murder which is subject to the disqualification of new section §189. I would not have been convicted under the theory used by the prosecution, had the changes existed at the time of my trial under new section §188."[4]

The trial court denied appellant's petition on May 17, 2019 without appointing defendant counsel or holding a hearing on the petition. The court issued an order stating: "The court is in receipt of defendant's Petition for Resentencing, filed pursuant to *Penal Code Section 1170.95* on April 16, 2019. The petition is summarily denied because petitioner is not entitled to relief as a matter of law. Petitioner was convicted of second degree murder. The court file, including the opinion from the court of appeals, reflects that petitioner was the actual killer and was not convicted under a theory of felony-murder. To find defendant guilty, the jury was required to conclude that the People proved beyond a reasonable doubt that the killing resulted from an intentional act. The jury also specifically found that defendant personally used a firearm in the commission of the offense. Given those factual findings by the jury, defendant is not entitled to relief as a matter of law. *See Penal Code Section 188(b).* [¶] For all the foregoing indicated reasons, the petition is DENIED."

Appellant timely appealed.

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[4]Former CALJIC No. 8.32 concerned second degree felony murder. It provided, "The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs [during] [as the direct causal result of] the commission or attempted commission of [certain crimes] is murder of the second degree when the perpetrator had the specific intent to commit such crime. (Third bracket added.)" (*People v. Swain* (1996) 12 Cal.4th 593, 601-602.)

DISCUSSION

I. Legal Principles

The primary purpose of SB 1437 is to align a person's culpability for murder with his or her own actions and subjective mens rea. (See Stats. 2018, ch. 1015, § 1, subd. (g).) To effectuate that purpose, SB 1437 amended sections 188 and 189. As amended, section 188, subdivision (a)(3) now provides that "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Section 189 now provides that a participant in qualifying felonies during which a death occurs generally will not be liable for murder unless that person was (1) "the actual killer," (2) a direct aider and abettor in first degree murder, or (3) "a major participant in the underlying felony [who] acted with reckless indifference to human life." (§ 189, subd. (e).)[5]

Senate Bill No. 1437 also added section 1170.95 to the Penal Code. Section 1170.95 permits a person convicted of murder on a charging document that allowed the prosecution to argue felony murder or the natural and probable consequences doctrine to petition the sentencing court to vacate the conviction and resentence on any remaining counts if the person could not be convicted of murder under sections 188 and 189 as amended

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[5]This limitation does not apply "when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties." (§ 189, subd. (f).)

by SB 1437. (§ 1170.95, subd. (a).) A petition for relief under section 1170.95 must include: "(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1).) If any of this information is missing "and cannot be readily ascertained by the court," the court may deny the petition without prejudice. (§ 1170.95, subd. (b)(2).)

If the petition contains the required information, section 1170.95, subdivision (c) prescribes "a two-step process" for the court to determine if it should issue an order to show cause. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 327.) First, the court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) If the petitioner has made this initial prima facie showing, he or she is then entitled to appointed counsel, if he or she has requested counsel. (*Ibid.*; *Verdugo*, *supra*, at p. 328; *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.) The prosecutor must file a response, and the petitioner may file a reply. (§ 1170.95, subd. (c).) The court then reviews the petition a second time. If, in light of the parties' briefing, it concludes the petitioner has made a prima facie showing that he or she is entitled to relief, it must issue an order to show cause. (*Ibid.*; *Verdugo*, at p. 328; *Lewis*, at p. 1140.)

"Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts." (*Verdugo*, *supra*, 44 Cal.App.5th at 327, citing § 1170.95, subd. (d)(1).) At the hearing, the parties may rely on

the record of conviction or present "new or additional evidence" to support their positions. (§ 1170.95, subd. (d)(3).)

We independently review whether the trial court properly interpreted and fulfilled its duty under the statute. (See *Greene v. Marin County Flood Control & Water Conservation Dist*. (2010) 49 Cal.4th 277, 287 [questions of law are reviewed de novo]; cf. Verdugo, *supra*, 44 Cal.App.5th at p. 328, fn. 8 [appellate court's principal task in interpreting a statute is to determine Legislative intent and give effect to the law's purpose].)

II. Analysis

Appellant contends that section 1170.95 gives rise to "special proceedings" in which a trial court "has only the power to determine whether the statutory requirements are met." His position is that the trial court must accept as true the allegations in a section 1170.95 petition, and has a ministerial duty to appoint counsel, issue the order to show cause, and conduct a hearing if the allegations meet the criteria of section 1170.95, subdivisions (a) and (b). In other words, "if the petition alleges facts that, if true, entitle the petitioner to resentencing, then the trial court 'shall issue an order to show cause' and 'shall appoint counsel to represent the petitioner'"; the trial court may not, as it did here, consult materials that may contradict the petition's allegations.

Every Court of Appeal to have considered the issue has held that in determining whether a petitioner has made a prima facie case for relief under section 1170.95, a trial court may look to documents that are part of the record of conviction or are otherwise in the court file. (See *Verdugo*, *supra*, 44 Cal.App.5th at 329 [documents in court file or record of conviction should be available to trial court in connection with first prima facie

determination under subd. (c)]; *Lewis*, *supra*, 43 Cal.App.5th at 1138 [trial court may summarily deny petition without briefing or appointment of counsel if court file shows petitioner was convicted of murder without instruction or argument based on felony-murder rule or natural and probable consequences doctrine]; *Cornelius*, *supra*, 44 Cal.App.5th at pp. 57-58 [affirming summary denial of petition based on verdict, trial transcript, and prior appeal].) We agree with the analyses of our sister courts.

In *Verdugo*, the Court of Appeal observed that section 1170.95, subdivision (b)(2) allows a court to consider readily ascertainable documents that are in the court file or otherwise part of the record of conviction to ensure the petition meets the requirements of subdivision (b)(1). (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) It reasoned that those same documents "should similarly be available to the court in connection with the first prima facie determination required by subdivision (c)." (*Ibid.*) The court further observed that some examination of case-related documents, such as the charging document, the verdict form, the factual basis of a guilty plea, and/or the abstract of judgment, is implied, "because a petitioner is not eligible for relief under section 1170.95 unless he or she was convicted of first or second degree murder based on a charging document that permitted the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine." (*Id.* at pp. 329-330.)

The Court of Appeal in *Lewis* reached the same conclusion. It reasoned that "in analogous situations trial courts are permitted to consider their own files and the record of conviction in evaluating a petitioner's prima facie showing of eligibility for

relief." (*Lewis*, *supra*, 43 Cal.App.5th at p. 1137.) The *Lewis* court highlighted petitions for writs of habeas corpus and petitions filed under section 1170.18 (Proposition 47) as examples of analogous circumstances in which the trial court may summarily deny relief based upon facts in its file that refute the facial allegations of the petition. (*Id.* at pp. 1137-1138.) Appellant likewise analogizes section 1170.95 petitions to petitions for writs of habeas corpus and section 1170.18 petitions, though he contends that trial courts in those types of "special proceedings" are also confined to the face of the petition when determining whether a prima facie case has been made.

We find the reasoning of *Lewis* and the authority it rests upon compelling. We agree with *Lewis* that "[a]llowing the trial court to consider its file and the record of conviction is also sound policy." (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138.) "'It would be a gross misuse of judicial resources to require . . . appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if . . . a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.'" (*Ibid.*, quoting Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) ¶ 23:51(H)(1).)

Following *Verdugo*, *Lewis*, and *Cornelius*, we look to the trial court's file in evaluating appellant's petition. The court file, including our prior opinion, reflects that appellant was the actual

killer and was not convicted under a theory of felony murder or the natural and probable consequences doctrine. Despite his assertion that the jury was given felony murder instruction CALJIC 8.32, the charging document does not allow for any such instruction. Aside from murder, appellant was charged only with unlawfully possessing a firearm. Felony murder was applicable only to "'an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189.'" (*People v. Chun* (2009) 45 Cal.4th 1172, 1182.) Unlawful possession of a firearm is not an inherently dangerous felony (*People v. Satchell* (1971) 6 Cal.3d 28, 40-41, overruled on other grounds by *People v. Flood* (1998) 18 Cal.4th 470), nor is it enumerated in section 189.

The record likewise reveals no basis for application of the natural and probable consequences doctrine, which applies only in the aider and abettor context. (See *People v. Chiu* (2014) 59 Cal.4th 155, 165-166.) Appellant was charged as a direct perpetrator and admitted that he shot Wilcher. (*People v. Brown* (Mar. 20, 2001, B141167) [nonpub. opn.].) Moreover, the jury found that appellant personally used a firearm during the commission of the murder. (*Ibid.*) Appellant was therefore ineligible for relief under section 1170.95.

Appellant also claims he was entitled to appointed counsel without regard to the veracity of his allegations. We reject his assertion. Section 1170.95 does not mandate the appointment of counsel during the initial "screening" phase, but only after the trial court has determined the petition sets forth a prima facie case. (See *Lewis*, *supra*, 43 Cal.App.5th at p. 1140; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 332-333; *Cornelius*, *supra*, 44 Cal.App.5th at p. 58 [rejecting claim that petitioner was entitled

to appointed counsel where he was indisputably ineligible for relief under section 1170.95].)

We further reject appellant's contention that the trial court's summary denial of his petition violated his federal constitutional right to counsel under the Sixth Amendment. Appellant had no constitutional right to counsel at this stage of a section 1170.95 proceeding. The retroactive relief afforded by section 1170.95 reflects an act of lenity by the Legislature and is not subject to Sixth Amendment analysis. (*Cf. People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156 [no right to jury trial in proceedings under SB 1437 because its retroactive relief is "an act of lenity that does not implicate defendants' Sixth Amendment rights"], citing *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064; *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [prisoners have no constitutional right to counsel "when mounting collateral attacks upon their convictions"].)

Finally, appellant claims that the summary denial of his petition violated his procedural due process rights because it deprived him of procedures to which he was entitled under section 1170.95. As discussed above, however, the trial court acted in accordance with section 1170.95's procedures when it consulted the court file and summarily denied appellant's petition. Appellant has therefore suffered no due process violation.

DISPOSITION

The order denying appellant's petition under section 1170.95 is affirmed.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.